

Submission to the Joint Oireachtas Committee on Health

In relation to the General Scheme of the Health
(Termination of Pregnancy Services (Safe Access Zones)) Bill 2022

prolife
campaign

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October 2022

The Pro Life Campaign welcomes the opportunity to comment on the General Scheme of the Health (Termination of Pregnancy Services (Safe Access Zones)) Bill 2022.

The Pro Life Campaign (PLC) is a human rights organisation which promotes pro-life education and policies which defend human life at all stages, from conception to natural death. We also campaign for resources to support and assist pregnant women and those in need of healing after abortion.

01– Introduction

Freedom of expression and the freedom of assembly are cornerstones of international human rights law. They underpin the ability of people to speak out against what they regard as injustice without fear of penalisation at the hand of the State.

It is a fundamental tenet of any free democratic society that anyone who believes that a wrong is taking place has a right to express their views against that wrong, and to peacefully protest against it at a time and place of their choosing.

The Bill represents a serious violation of these civil liberties by specifically targeting those who peacefully express particular views.

In Europe, since changes were introduced to laws on abortion from the 1960s onwards, significant numbers of people including lawyers, politicians and human rights advocates have campaigned for the protection of unborn life and against laws permitting abortion. This year in the United States, decades of campaigning and protest have played a role in the overturning of the Roe v Wade decision, with abortion being prohibited or greatly restricted in 17 states, with restrictions to follow soon in 5 more states.

The debate concerning the moral and legal issues surrounding abortion is intense due to the profound importance of the primary issue involved – life itself.

723,632 Irish people (33.6% of voters) voted to retain the Eighth Amendment in May 2018.

Research subsequently showed that large numbers of those who voted Yes believed that the Irish abortion legislation implemented on foot of the referendum result should contain clear limitations.¹ However, as the Bill before the Committee illustrates, this Government and the last has committed itself to implementing an extreme and draconian abortion regime.

The Health (Regulation of Termination of Pregnancy) Act 2018 introduced abortion on demand in Ireland, a procedure defined in the Act as “*a medical procedure which is intended to end the life of a foetus*”.²

The deliberate and intentional ending of human life is such a grave reality that it is bound to prompt those who are shocked by it to exercise their rights to freedom of expression and assembly in order to work to end this injustice.

¹For example, an opinion poll conducted by Amárach Research in October 2018 found that a clear majority of the electorate opposed abortions being funded by the taxpayer, and supported a positive legal obligation on doctors to save the lives of children who survive an abortion and are born alive. Amendments were proposed to the Health (Regulation of Termination of Pregnancy) Act 2018 which would have addressed these issues, but these were voted down by the Government.

²Definitions section of the Act. <https://www.irishstatutebook.ie/eli/2018/act/31/section/2/enacted/en/html#sec2>

Vigils And Protests

Since the introduction of the extreme abortion regime in 2019, small groups of people have been engaged in a limited number of peaceful pro-life vigils or protests outside hospitals and GP practices across the country where abortions are being carried out.

Those taking part in these vigils generally engage in some or all of three main activities, which vary from place to place:-

- Distributing information on alternatives to abortion and counselling services which are available to women dealing with an unplanned pregnancy.
- Protesting against the ending of human lives at those medical facilities.
- Praying for unborn babies and their mothers.

This Bill seeks to prohibit these peaceful activities within so-called “safe access zones”, in a deliberate attempt to criminalise the peaceful conduct of citizens who hold views which oppose abortion.

The use of the term “safe access zones” appears to be a euphemism designed to soften the image of what is being proposed. The term “exclusion zones” would be more accurate, and is in fact how the term was described in the current Programme for Government.³ One group which supports these proposals has suggested that this change of language “*demonstrates a change in thinking around the necessity for these areas around healthcare providers.*”⁴ (Similar changes of language appear to take place on a daily basis in healthcare facilities which carry out abortions, with research compiled by medics who favour abortion noting that staff are trained in “a different way of speaking”, using the term “baby” to a woman who has had a miscarriage, and the term “foetus” when dealing with a woman who has had a termination.)⁵

The Committee should request that the Minister for Health explain what “change of thinking” has brought about this change of language from “exclusion zones” to “safe access zones”.

The PLC believes that the proposals in the Bill are a clear attempt to suppress freedom of speech and peaceful assembly by groups who oppose the policies of the Government in relation to abortion. The Bill is therefore a violation of both the Constitution, and the European Convention on Human Rights.

The PLC believes that the Committee and the Oireachtas should reject the Bill, on three primary grounds:-

Scope

- The Bill is breathtaking in its scope, by seeking to establish exclusion zones at every hospital and every GP practice in the State, even though at least 90% of these premises do not carry out abortions.
- It seeks to criminalise peaceful activities which are protected by the constitutional right to freedom of expression, such as expressing support for the right to life and distributing information on alternatives to abortion.

³“Our Shared Future”, Programme for Government 2020, p.47. <https://assets.gov.ie/130911/fe93e24e-dfe0-40ff-9934-def2b44b7b52.pdf>

⁴https://twitter.com/together_safety/status/1359946037083967500

⁵B Stifani, et al., “Abortion policy implementation in Ireland: successes and challenges in the establishment of hospital-based services”, at p.6

Justification

- There is no evidence for the Government’s claim that pro-life vigils and protests routinely subject women to harassment and threats.
- An Garda Síochána have said that the Bill is “redundant”⁶ and that they already have sufficient powers on the statute books to allow them to police vigils and protests. The Garda Commissioner has told the Government that the force has not received reports of harassment or threats at these gatherings.

Constitutionality

- Due to its broad scope, and the extent to which it infringes the freedom of expression and freedom of assembly, in our view the Bill is a violation of Bunreacht na hÉireann and the European Convention on Human Rights, which both provide clear protections for those rights. The Bill will most likely not withstand a challenge before the Irish courts or before the European Court of Human Rights.

02– Scope of the Bill

Under Head 3 of the General Scheme, the Bill would establish an exclusion zone of 100 metres in radius around “*all healthcare premises*”, a term which is defined as being a premises which is occupied by a registered medical practitioner or by a hospital.

These provisions are drafted in a way that ensures that an exclusion zone would be established around every hospital, community care centre, secondary care centre, and GP practice in the State, irrespective of whether they are carrying out abortions or not. The Explanatory notes under Heads 2 and 3 make it clear that this is the explicit aim of the Bill.

This proposal is wildly disproportionate. No such law exists at a national level in any other country of the European Union – let alone a law which applies such blanket “zones” where free speech and free assembly would be banned.

To illustrate the wide-ranging nature of this proposal, the Committee should consider these important figures:-

Number of Hospitals in Ireland	86
Number of GP practices in Ireland ⁷	1,635
Number of single-GP practices	874
Number of group practices	761
Number of GPs in Ireland ⁸	3,496
GPs who have signed up to provide abortion services ⁹	413
Total number of GP consultations annually in Ireland ¹⁰	29,000,000
Total number of GP consultations annually in relation to termination of pregnancy ¹¹	12,910

⁶Letter from the Garda Commissioner Drew Harris to the Minister for Health, September 2019, discussed below. <https://www.irishtimes.com/news/health/existing-laws-adequate-to-deal-with-abortion-protests-says-garda-commissioner-1.4031727>

⁷Smith S, Walsh B, Wren M, Barron S, Morgenroth E, Eighan J, et al. Geographic profile of healthcare needs and non-acute healthcare supply in Ireland. ESRI Research Series: 90. Dublin: The Economic and Social Research Institute; 2019.

⁸Figures given by the Irish College of General Practitioners (ICGP), quoted in Collins C. “GPs: the numbers game” J Irish Col Gen Pract. 2020;37(1):17–8.

⁹Figure correct as of 14 June 2022. <https://www.oireachtas.ie/en/debates/question/2022-06-28/887/>

¹⁰Collins, C., *ibid*.

¹¹In 2020 there were 6,455 medical abortions under section 12 of the Health (Regulation of Termination of Pregnancy) Act 2018, each of which required two consultations with a doctor. <https://assets.gov.ie/138755/6ae02c5a-c60b-4954-b438-8e8397eb0aaf.pdf>

With just 12% of GPs providing abortion services, and with a large proportion of GPs concentrated in group practices, it can be estimated that at least 1,400 of the 1,635 GP practices in Ireland do not carry out abortions.

- So, under this Bill, at least 1,400 GP practices would be declared as exclusion zones, despite the fact that no “termination of pregnancy services” are taking place at those sites.
- Less than 0.05% of all visitors to GP practices are for consultations relating to termination of pregnancy services, and yet this Bill seeks to deny pro-life advocates their constitutional rights to freely express their opinions to the other 99.5% of people visiting those practices.

Under the proposed legislation, if a person (friend, partner, family member etc) accompanying the woman for an abortion revisited their conversation outside the abortion facility on whether to proceed with the abortion, the person accompanying the woman would be in breach of the law for expressing an opinion on the matter, highlighting the absurdity, unforeseen consequences and ill-conceived nature of the law.

These facts show the grossly disproportionate nature of the Bill, and illustrate that it has nothing to do with protecting women, and everything to do with restricting pro-life advocacy.

The sheer breadth of the reach of this legislation will most likely mean that it will fail the tests which the courts will apply when testing its constitutionality (see a discussion of this below).

Peaceful Activities Banned

The proposed legislation singles out a range of peaceful and innocuous activities which are entirely legal, but which will be banned within exclusion zones, with severe maximum sentences for repeat occurrences:-

Head	Peaceful conduct which would be banned	Maximum Penalty
4 (3)(c)	Communicating with a woman in an attempt to persuade her not to have an abortion	6 months imprisonment
4 (3)(h) and 4 (3)(j)	Distributing materials intended to persuade a woman not to have an abortion	6 months imprisonment
4 (3)(n)	Offering counselling to women in a crisis pregnancy who are seeking an abortion	6 months imprisonment

It is extraordinary that any Government could propose imposing such draconian punishments on peaceful and lawful activities carried out by pro-life advocates. These completely disproportionate measures will most likely contribute to the Bill being struck down as incompatible with the Constitution.

03– Lack of Justification for the Bill

In July 2018, the then Minister for Health announced that the Government would pre-emptively ban protests at healthcare facilities which carried out termination of pregnancy. Minister Simon Harris said he would legislate for

“... the provision of safe access zones – areas around premises where abortion services are provided where patients and staff can go without fear of intimidation or harassment, and without being subjected to posters or protests”¹²

It is important to note that this announcement was made before the abortion legislation came into force, and before a single pro-life vigil or protest had even taken place at a healthcare facility.

This is surely the first and only example of a Government committing to outlaw activity which had not even occurred yet.

Conduct of Protests and Vigils

Since abortions commenced in 2019, small pro-life demonstrations have taken place at a number of hospitals and GP practices across the country. All of these protests have been entirely peaceful, and no complaints have been made to An Garda Síochána. Groups who favour abortion have made several false and malicious claims that such protests have not been peaceful, resulting in one hospital group taking the step of issuing a statement to specifically refute these claims as being false.¹³

In September 2019, the Garda Commissioner wrote to the Minister for Health to say that new legislation in relation to these vigils was not necessary, and that any new laws would be “redundant” because

“ no incidence of criminality has been reported or observed..”

and that there was

“... no evidence to suggest that there is threatening, abusive or insulting behaviour directed towards persons utilising such services.”¹⁴

Despite this unambiguous statement by the Garda Commissioner, pro-life advocates have been regularly and consistently defamed by Minister Simon Harris, Minister Stephen Donnelly, opposition parties, and groups favouring abortion, who have all falsely stated that pro-life vigils routinely result in women being harassed and threatened.

Separately, in response to a Freedom of Information Request issued on 22 October 2019, the Department of Health confirmed that no medical practitioner, hospital, or GP practice had contacted them to request new laws to address such vigils. For the Government to set out alleged risks of pro-life demonstrations without the presence of an underlying evidence basis is a very significant oversight. That policy intending to criminalise certain behaviour is being formulated with an absence of evidence is troubling and indicative of prejudice.

In the Seanad, on 10th February 2022, the Minister for Health Stephen Donnelly acknowledged that introducing legislation for exclusion zones “pushes up against civil liberties”, yet he still pressed ahead with his proposal. He also openly admitted that he was ignoring the advice of An Garda Síochána and instead was taking guidance on the matter from pro-abortion groups like Together for Safety.

¹²<https://www.gov.ie/en/press-release/e288ff-minister-harris-gets-Government-approval-for-legislation-which-will-/>

¹³<https://www.limerickpost.ie/2021/12/09/limerick-hospital-group-says-it-has-no-record-of-anti-abortion-protests/>

¹⁴<https://www.irishtimes.com/news/health/existing-laws-adequate-to-deal-with-abortion-protests-says-garda-commissioner-1.4031727>

Together for Safety it should be said has a poor record when it comes to making accurate public statements. Last year, the UL Hospitals Group was forced to take the unusual step of issuing a statement refuting claims made by Together for Safety that there had been “intimidatory” anti-abortion protests outside its facilities.

Despite all this, the Minister for Health publicly thanked Together for Safety for “informing the development of legislative proposals”.¹⁵ The Minister’s public praise of Together for Safety is at least confirmation of what’s really driving the bill that’s being introduced.

The Government’s proposal on exclusion zones clearly has nothing to do with public safety and everything to do with singling out a particular category of people, namely those who oppose abortion, and criminalising the expression of their views.

In its submission on exclusion zones to your committee, the Irish Human Rights and Equality Commission (IHREC) cites research from Maynooth University¹⁶ when proposing prison sentences of up to two years for pro-life people holding peaceful protests outside abortion facilities.

The online survey on which the research is based was circulated in the name of Maynooth University, allied with the campaigning group Together for Safety mentioned above.

As an indication of where the researchers were coming from, the Maynooth survey among other things refers to pro-life people as “anti-choice”. The author of this piece of academic research has also publicly endorsed views about the “importance of fighting anti-abortion activism”.¹⁷

For the IHREC to base its call for prison sentences for pro-life people on the Maynooth research raises not only questions about the commission’s commitment to basic civil liberties but also about its credibility as a trusted evidence based body.

Existing Laws

As the Garda Commissioner pointed out in his letter to Minister Harris in 2019, the Gardaí already have extensive and wide-ranging powers to police all public gatherings, including pro-life vigils and protests. For the benefit of the members of the Committee, the PLC believes that it is important to put on record the range of existing powers which Gardaí have to police any protests which are not peaceful.

Criminal Justice (Public Order) Act 1994

Section	Offence	Maximum Penalty
5.	Disorderly Conduct in a public place	Fine of up to €1,000 ¹⁸
6.	Threatening, abusive or insulting behaviour	3 months imprisonment
7.	Distribution or display in a public place of material which is threatening, abusive, insulting or obscene.	3 months imprisonment
8.	Failure to comply with the direction of a Garda	6 months imprisonment
9.	Obstructing the free passage of a person or vehicle	Fine of €500
11.	Trespassing with intent to commit an offence	6 months imprisonment
13.	Trespass on building, etc.	12 months imprisonment
14.	Riot	10 years imprisonment
15.	Violent disorder	10 years imprisonment
16.	Affray	5 years imprisonment

¹⁵<https://www.gov.ie/en/press-release/5bedd-minister-donnolly-announces-Government-approval-of-the-heads-of-bill-to-legislate-for-termination-of-pregnancy-safe-access-zones>

¹⁶<https://mural.maynoothuniversity.ie/16215>

¹⁷https://twitter.com/Camilla_Fitz/status/1569963511828324352

¹⁸Fine increased by later legislation

Non-Fatal Offences Against the Person Act 1997 (as amended).

Section	Offence	Maximum Penalty
2.	Assault	6 months imprisonment
5.	Threats to kill or cause serious harm	10 years imprisonment
9.	Coercion	5 years imprisonment
10.	Harassment	10 years imprisonment
13.	Endangerment	7 years imprisonment
14.	Endangering traffic	7 years imprisonment

Gardaí have the power of arrest without warrant in respect of almost all of the above offences. The offence of harassment was amended as recently as December 2020 by the Harassment, Harmful Communications and Related Offences Act 2020 to ban the practice of indirect harassment.

The above lists are of course not intended to suggest that there is any prospect of pro-life vigil participants engaging in the kind of offences listed above. The point is that, taken together, these Acts give wide-ranging powers to the Gardaí to police and regulate every conceivable problem which could arise in the context of any gatherings held in a public place. These laws are used by the Gardaí on a daily basis, and anyone taking part in protests who engages in such behaviour can be prosecuted under these existing provisions.

New laws simply are not necessary.

“New” offences and Garda powers in the Bill already exist in law

The General Scheme says that the Bill will give “new” powers to the Gardaí to deal with obstruction of hospitals or GP practices, and the harassment of women or staff of those facilities. However, each of the supposed “new” provisions outlined in the General Scheme is already prohibited in existing legislation.

Head	“New” offences and Garda powers	Existing legislation
4 (3)(b)	Blocking access to a healthcare premises	Currently an offence under Section 9 of the Criminal Justice (Public Order) Act 1994
4 (3)(g)	Intimidating or harassing any service provider or a person attempting to access the services of a healthcare provider	Intimidation and harassment are currently offences under Sections 8 and 10 of the Non-Fatal Offences Against the Person Act 1997, respectively.
6	Intimidation or harassment of a service provider	Intimidation and harassment are currently offences under Sections 8 and 10 of the Non-Fatal Offences Against the Person Act 1997, respectively.
7(2)	Failing to comply with the direction of a member of An Garda Síochána	Currently an offence under Section 8 of the Criminal Justice (Public Order) Act 1994
7(3)	Power of arrest for a member of An Garda Síochána	Already provided for by Section 24 of the Criminal Justice (Public Order) Act 1994
7(2), 7(5)	Power of a Garda Síochána to require a person to state their name and address	Already provided for by Sections 23A and 24 of the Criminal Justice (Public Order) Act 1994

The fact that the Bill replicates a range of offences and Garda powers which already exist in law shows that the primary aim of the Bill is not to protect women and the staff of healthcare facilities, but to create an air of criminality around pro-life vigils and protests by seeking to create a special category of offences which apply only to pro-life advocates, but not to other public gatherings.

Who is seeking this legislation?

The Committee needs to consider who is actually seeking this legislation. The General Scheme states that there has been “*significant support for safe access legislation*”.¹⁹ Where is this support coming from, and how has it manifested itself?

- An Garda Síochána has specifically said that the legislation is not needed (see reference from letter from Commissioner Drew Harris above)
- As of October 2019, (over 9 months after abortions commenced) the Department of Health and HSE had not received a single communication from a hospital or a GP practice which requested the introduction of exclusion zones.

It is certainly true that pro-abortion campaign groups have sought this legislation, but this is not enough to justify such a radical attack on the fundamental constitutional rights of Irish people.

What’s really behind this Bill?

It is clear from the contents of the General Scheme, and the Explanatory Notes contained in it, that the aim of the Bill is not to protect women from threat or harassment, since it doesn’t contain a single measure to combat such conduct which does not already exist elsewhere in law.

The clear aim of the Bill is to try to cast a cloud of criminality over all pro-life activity, under the veneer of protecting women from ‘harassment’. The very use of the term “safe access zones” illustrates this, since it suggests that without this Bill, there is something unsafe about these vigils.

Nothing could be further from the truth, and yet Ministers and pro-abortion groups continue to defame the peaceful pro-life advocates who take part in these events.

Proposals for exclusion zones are simply the means by which the abortion movement hopes to prohibit pro-life activism in Ireland in the years to come, with the assistance of politicians who support their views.

Bunreacht na hÉireann and the European Convention on Human Rights prohibit the law being used to silence the views of citizens in this way.

¹⁹Head 3, Explanatory Note

04– Constitutionality

The Bill represents a serious interference with a number of rights protected by Bunreacht na hÉireann.

While a detailed legal discussion goes far beyond the scope of this submission, the PLC believes it is important that we provide the Committee with a summary of the reasons why the Bill will not stand up to scrutiny when challenged before the Irish Courts. This is particularly necessary in view of the extraordinary fact that the Irish Human Rights and Equality Commission – the statutory body whose role it is to examine the human rights implications of legislative proposals – failed to include any discussion whatsoever on the constitutionality of the Bill in its own submission to the Committee.²⁰ Indeed, the Commission’s position on the Bill seems particularly questionable given its functions under the Irish Human Rights and Equality Commission Act 2014 – functions which specifically include protecting and promoting constitutional rights.²¹

Freedom of Expression and Assembly

Article 40.6 of the Constitution guarantees the following rights:-

“1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

*i The right of the citizens to express freely their convictions and opinions.
[...]*

*ii The right of the citizens to assemble peaceably and without arms.”
[...]*

2° Laws regulating the manner in which the...right of free assembly may be exercised shall contain no political, religious or class discrimination.”

The Irish courts have regularly upheld the principle that citizens have the right to assemble in a public place, provided that all such gatherings are peaceful, and that they do not trespass on private property or obstruct a public road.

In 2014, Mr Justice Gerard Hogan – now a judge of the Supreme Court – summarised the constitutional position when he said, in relation to a case involving a protests at a racecourse:-

“...the most important feature of all is that the protestors sought only to persuade and to rest their case on an appeal to the sporting public to acknowledge the justness of their cause while remaining within the law. As we have already noted, there was no overt act or even implied threat against those who ignored the protest. The protestors merely sought for the most part to convey information regarding the background to the dispute. Given that the free exchange of ideas, arguments and views is central to the operation of the democratic State envisaged by Article 5 and is at the heart of the protections of free speech and peaceable assembly contained in Article 40.6.1, the public expression and manifestation of different and dissenting views must – in general, at least – be tolerantly accepted by all.”²²

This passage also perfectly describes pro-life vigils and protests, and demonstrates why they too enjoy the full protection of the Constitutional right.

²⁰<https://www.ihrec.ie/app/uploads/2022/10/Submission-on-the-General-Scheme-of-the-Health-Termination-of-Pregnancy-Services-Safe-Access-Zones-Bill-2022-27092022-PDF.pdf>

²¹See in particular sections 2 and 10(1) of the 2014 Act.

²²*Hyland v Dundalk Racing (1999) Ltd* [2014] IEHC 60.

Freedom of religion and of conscience²³

For those praying at abortion facilities, or otherwise expressing or motivated by their religious beliefs when opposing abortion, the constitutional right to the free practice and profession of religion is clearly infringed by the Bill.

The Committee should also note that Head 5 (2) contains a carve-out which has the effect that a public place of worship (a church or other such building) will not be considered to be part of an exclusion zone. However, the Explanatory Note says that

“It is intended that this exception will apply within indoor environments and not for example, on the exterior grounds of a place of worship”.

Again, this seems extraordinary. The exterior grounds of a place of worship are private property owned by the religious congregation and accessible to its members. Religious congregations regularly erect banners or billboards on their properties to advertise events, or to convey messages to passers-by in accordance with their beliefs. Under Head 5(2), religious congregations whose property falls within an exclusion zone would seem to be prohibited from erecting any such message on its own property which had a pro-life message.

Under the General Scheme, the “curtilage” of a hospital or GP practice is deemed to be part of the premises, with the exclusion zone extending 100 metres beyond the boundary of the entire property (premises plus curtilage). Can it seriously be contended that the curtilage of a place of worship should not be treated in the same way and be deemed to be part of the premises of the place of worship?

Once again, the Bill seems to discriminate in one direction, and go further than even its own stated aims would purportedly require.

Private Dwellings

The Committee should also urgently clarify the position of private property more generally, as the General Scheme is not clear on how exclusion zones apply to private dwellings in particular.

In urban areas, GP practices often occupy what were formerly residential properties, sometimes on terraced streets or in housing estates. In these circumstances, an exclusion zone could easily encompass multiple privately-owned dwellings on all four sides of the practice, as well as their curtilage.

Head 5 contains no carve-out for private dwellings, and so it would appear that the Bill could criminalise communications in relation to abortion which a person carries out in the privacy of their own home. Clearly this would be perverse, and another gross violation of constitutional rights, including privacy and the free enjoyment of private property.

Government is clearly “on notice” of the Bill’s unconstitutionality

The Government is clearly aware that this Bill is most likely to be unconstitutional, due to the rights infringed.

Despite promising this legislation in July 2018, it took over four years for the Department of Health to produce a draft General Scheme of the Bill. In that time, the Department of Health has produced literally thousands of pages of primary legislation and statutory instruments on a range of issues.

²³Freedom of conscience is protected by the Constitution in two provisions:- in a religious context by Article 44.2.1, and in a non-religious context by way of a broader unenumerated right to freedom of conscience in Art. 40.3.

The fact that it took four years to produce the General Scheme of a Bill with just 8 sections suggests that very serious constitutional obstacles came to light while the General Scheme was being written.

Minister Donnelly openly acknowledged this problem when he told Seanad Éireann earlier this year:

“The Department got a very clear instruction from me to provide the heads of the Bill. It has been working very hard to that effect and has come back to say that this is very difficult to do.... One of the reasons [the previous Government] did not [introduce the Bill] was that An Garda Síochána said it did not need this measure and had very strong advice stating that it was not necessary, would not be constitutional, would not survive a challenge....

.... the advice I have back from the Department is that, potentially, some quite significant trade-offs must be made here. We are looking at constitutionality, civil liberties, freedom of speech and so on.”²⁴

The Committee should inquire of the Minister as to why the Government is persisting with a Bill which it knows has clearly raised serious constitutional problems.

The Bill is not “Neutral” about the conduct it prohibits

A further consideration in assessing the constitutionality of the Bill will be its clear discrimination against one set of opinions over all others. The Bill is clearly not neutral as to the type of conduct which is prohibited, with opinion and activity which is opposed to abortion being strongly targeted.

While the General Scheme contains some token restrictions on pro-abortion campaigning (for example by prohibiting communication which persuades a woman to avail of termination of pregnancy services under Head 4(3)(d)), the Explanatory Notes in the General Scheme make it abundantly clear that the overwhelming aim of the Bill is to facilitate the termination of pregnancies without women being exposed to pro-life advocacy.

This clear discrimination against certain citizens based on their views is a gross violation of the Constitution, and the European Convention on Human Rights.

If it were allowed to stand, it would open up the possibility of future Governments criminalising protests against other aspects of their own policies, a situation which could not possibly be acceptable.

²⁴Seanad Éireann Debates, Vol. 282 No.11, 10 February 2022

How would the Courts assess the Constitutionality of the Bill?

When legislation is challenged in the courts by a citizen on the basis of alleged unconstitutionality, a test of “proportionality” will be applied. Essentially the court will consider whether the objective of the legislation is sufficiently important to justify interfering with a constitutionally protected right.

A court will assess whether the restrictions on a constitutional right contained in a Bill

- are rationally connected to the objective and are not arbitrary, unfair or based on irrational considerations;
- impair the right as little as possible; and
- are such that their effects on rights are proportional to the objective.²⁵

Clearly, the provisions of the Bill restrict the rights to freedom of expression and freedom of assembly to a quite extraordinary degree, by implementing a blanket ban on speech and assembly within huge numbers of newly-created exclusion zones. It also goes far beyond what is necessary to achieve the stated aims of the Bill, by imposing the zones on at least 1,400 sites where termination of pregnancy services are not even carried out.

Given the draconian extent of the proposed restrictions, the sufficiency of existing law as discussed above, and the scope and range of Constitutional rights that the Bill infringes, it seems clear that any legislation which seeks to ban such peaceful activity will be found to be a breach of the Constitution.

05— Compatibility with the European Convention on Human Rights

The Bill clearly interferes with a number of rights protected by the European Convention on Human Rights (the “Convention”)²⁶, specifically:-

- Article 10 – the right to freedom of expression;
- Article 11 – the right to freedom of assembly
- Article 9 – the right to freedom of religion

While national Governments may restrict these rights or interfere with them in accordance with the law, in ways which are “necessary in a democratic society”, any restriction (like restrictions on rights guaranteed by the Constitution) must observe “proportionality”. That is to say that the level of interference with these rights must be no more than is necessary to accomplish the objective of the proposed measures.

These rights contained in Articles 9-11 have been given robust protection from the European Court of Human Rights (“ECHR”) which has recognised in particular that freedom of expression has a “special importance” under the Convention.

The ECHR has ruled that blanket bans on free expression and assembly, such as those contained in the Bill, could only be justified where there is strong evidence of a risk of violence. In *Stankov v Bulgaria*²⁷, the Court stated:

²⁵The judgment of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, in passages later approved in *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321 at pp. 349-350

²⁶https://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁷*Stankov v Bulgaria*, application no. 25820/07, 2015

“Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be - do a disservice to democracy and often even endanger it”

Freedom of Expression in the context of Pro-Life Campaigning

Generally speaking, in determining whether interferences with the right to freedom of expression in the context of pro-life protests are justified, there are three specific factors taken into account by the ECHR:-

- That freedom of expression under the Convention includes the right to express views which may offend or shock others,
- that topics of public interest and concern should be given a heightened concern, and
- that advocacy groups are an important part of the democratic process.

It has been acknowledged that prayer in the vicinity of exclusion zones would be prohibited. The inclusion of silent prayer under this prohibited category poses a serious threat not just to freedom of religion under Article 9.2 but also to freedom of thought under Article 9.1. As this is an absolute right, it cannot be undermined without seriously infringing on human rights. Proposals to ban silent prayer present a direct challenge to these rights.

The freedom to “offend, shock and disturb”

A key justification for the Bill is the notion that people attending at hospitals and GP practices for termination of pregnancy services should not be exposed to information or views which they view to be offensive or contrary to their own views or decisions. This position flies in the face of the Convention.

The ECHR has repeatedly protected the right to peaceful freedom of expression, even where those opinions may shock or offend a third party.²⁸

In *Giniewski v. France*²⁹, the ECHR found that even though a published text “contains conclusions and phrases which may offend, shock or disturb some people, the Court has reiterated that such views do not in themselves preclude the enjoyment of freedom of expression.”

As a corollary, there is also no right under the Convention to be protected from speech or opinion which a person might find shocking or offensive.³⁰

²⁸See *Surek v. Turkey* (No. 3) [G.C], Application no. 24735/94, 8 July

²⁹*Giniewski v. France*, Application no. 64016/00, 31 January 2006

³⁰*Öllinger v. Austria*, Application no. 76900/01, 29 September 2006

Heightened protection for topics of public interest

The ECHR has also given significant regard to “*the special degree of protection*” afforded to expressions of opinions which are made “*in the course of a debate on matters of public interest.*”³¹ Political speech and expression is deserving of the highest form of protection under the Convention, because “*freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*”³²

In *Morice v. France*³³, the ECHR found that abortion is clearly a matter of public interest and concern, requiring the highest level of protection under Article 10 of the Convention.

The importance of advocacy groups

The ECHR has also made clear that advocacy groups play an important role in the democratic process, and therefore deserve protections. This is particularly relevant, given that the Bill is primarily targeted against small pro-life advocacy groups.

In *Steel and Morris*³⁴, the ECHR emphasised the legitimate and important role that campaign groups can play in stimulating public discussion, and stated that:

“In a democratic society even small and informal campaign groups ... must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.”

Annen v Germany

The recent case of *Annen v Germany* is directly relevant, since it concerned an injunction which two doctors had secured against Mr Annen to prevent him from disseminating certain information outside their abortion clinic.

On appeal, the ECHR found this injunction to be a breach of Article 10. It said:-

“Freedom of expression constitutes one of the most essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’...

Another principle that has consistently been emphasised in the Court’s case-law is that there is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest...”

³¹Hoffer and Annen v. Germany, Application nos. 397/07 and 2322/07, 13 January 2011, § 44

³²Lingens v. Austria, Application no. 9815/82, 8 July 1986

³³Morice v. France [GC], Application no. 29369/10, 23 April 2015.

³⁴Steel and Morris v. the United Kingdom, Application no. 68416/01, 15 February 2005

The ECHR also found that the place where Mr Annen conducted his campaign was integral to its effectiveness, and that such a protest would be rendered ineffective by being required to be conducted at some other venue, away from the abortion clinic:

“disseminating leaflets...in the immediate vicinity of the day clinic enhanced the effectiveness of [the applicant’s] campaign [and] ... contributed to a highly controversial debate of public interest. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake.”

The Bill also infringes this requirement, by compelling pro-life advocates to move their protests to another venue.

In view of the clear provisions of the Convention, and previous judgments of the ECHR, the blanket imposition of exclusion is clearly incompatible with Arts 9-11 and would be struck down in a future challenge.

06– International Comparisons

Groups which support widespread abortion often contend that exclusion zones, otherwise known as “exclusion zones”, “bubble zones”, “buffer zones”, or “censorship zones”, are increasingly the norm in other European jurisdictions and around the world.

While it is correct that there have been increasing attempts to introduce such zones internationally, these attempts have been largely ineffective and have failed either due to political hurdles or after legal challenges to their infringement on the rights of freedom of expression and freedom of assembly.

A paper produced by the Oireachtas Library and Research Service in 2019 showed that no country in the European Union has a law which prohibits peaceful vigils or protests outside healthcare facilities.³⁵

The Committee should consider the situation in several jurisdictions including England and Wales, Scotland, Germany, and the United States.

England and Wales

In January 2018 the UK Home Office consulted with abortion providers, women who had availed of abortion, police forces, local authorities, and members of the public, receiving over 2,500 responses. The review found that just 36 out of 363 hospitals in England and Wales (10%) had experienced any protests or vigils.

The then Home Secretary, Sajid Javid MP said that, aside from some very rare instances, “anti-abortion activities are more passive in nature.” such as “praying, displaying banners and handing out leaflets.”³⁶

He said that:

“Having considered the evidence of the review, I have therefore reached the conclusion that introducing national buffer zones would not be a proportionate response, considering the experiences of the majority of hospitals and clinics, and considering that the majority of activities are more passive in nature.”

He also noted that existing police powers were sufficient to deal with any issues that arise.

³⁵https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-05-08_1-rs-note-safe-access-zones-what-do-other-countries-do_en.pdf

³⁶Outcome of the Abortion Clinic Protest Review, UK Parliament, 13 September 2018. <https://questions-statements.parliament.uk/written-statements/detail/2018-09-13/HCWS958>

Scotland

In 2018, Edinburgh City Council requested a report on the options available to create a “buffer zone” which would restrict pro-life protests. The representatives of the National Health Service told the Council that

“as things currently stood there was no overwhelming evidence to suggest the actions were causing unnecessary distress and as such did not feel the necessity to enact any police measures.”³⁷

Germany

A case was brought in 2019 by Pavica Vojnović following the prohibition of her group’s peaceful prayer vigils by the local authorities of the city of Pforzheim. On 31 August 2022, the Mannheim Administrative Court ruled that

“authorities could only make an assembly dependent on such a condition if public safety would be directly endangered if the assembly were held. This was not the case here.”³⁸

The ruling upheld the rights to freedom of assembly, religion, and expression.

United States

In 2014, the State of Massachusetts introduced an 11-metre “exclusion zone” around abortion clinics in the state, however the US Supreme Court unanimously struck down the law as a violation of the US Constitution. All nine Justices of the Court – including the liberal Justices Ruth Bader Ginsburg, Sonya Sotomayor, Elena Kagan, and Stephen Breyer – commented that exclusion zones

“...impose serious burdens on petitioners’ speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature. Those forms of expression have historically been closely associated with the transmission of ideas. While the Act may allow petitioners to “protest” outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.”

³⁷http://www.edinburgh.gov.uk/meetings/meeting/4667/south_east_locality_committee

³⁸<https://verwaltungsgerichtshof-baden-wuerttemberg.justiz-bw.de/pb/,Lde/10525253/?LISTPAGE=1213200>

07– Conclusion

This Bill sets a very dangerous precedent.

If people can be prosecuted and jailed for publicly voicing their opposition to Government policy on abortion, then there may be no limit to the speech and assembly which can be restricted by future Governments.

The clear social value of peaceful pro-life vigils was demonstrated in 2019, when Ms. Alina Dulgheriu addressed members of the All Party Oireachtas Life and Dignity Group.

Ms. Dulgheriu told Oireachtas members:-

“The day I made my way to the abortion facility was the darkest day my heart has ever known. All I needed was help until I gave birth. A lady and a leaflet. That’s all it took. Right there at the steps of abortion centre. From all that darkness, at last I felt hope, I felt for the first time that my child was wanted, not only by me, but also by complete strangers. For the first time, I felt that I was not walking alone on the day I was meant to end the life within me - my child. I cannot express the joy and how fulfilled I felt as a woman, as a mother, to be given the chance to have my child.

“A just and caring society doesn’t criminalise people for offering help to vulnerable mothers.

“Expectant mothers should have all of the information, resources and emotional support that they need during their pregnancy – especially an unexpected pregnancy”

This clear demonstration of how free speech and freedom of assembly can be used to persuade other people to change their views, or to accept offers of help, are the very reasons why these rights are given such strong protection in all democratic societies.

It is for these reasons that the Pro Life Campaign calls on the Committee and on the Oireachtas to reject this Bill as an unjust attack on those rights.



Submission to the Joint Oireachtas Committee on Health

In relation to the General Scheme of the Health
(Termination of Pregnancy Services (Safe Access Zones)) Bill 2022

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